No. 89-1263

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In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

DARLINA K. FRANCE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether this Court's decision in *Gomez* v. *United States*, 109 S. Ct. 2237 (1989), requires reversal of respondent's convictions even though she did not object to a magistrate's conducting voir dire and even though her attorney expressed no objection to the manner in which the jury was selected.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 886 F.2d 223.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1989, and a petition for rehearing was denied on January 16, 1990. The petition for a writ of certiorari was filed on February 26, 1990, and was granted on April 23, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULES INVOLVED

Federal Rule of Criminal Procedure 51 provides:

> Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which that party desires the court to take or that party's objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice that party.

Federal Rule of Criminal Procedure 52(b) provides:

> *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

After a jury trial in the United States District Court for the District of Hawaii, respondent was convicted of assault with a deadly weapon, in violation of 18 U.S.C. 113(c); assault resulting in serious bodily injury, in violation of 18 U.S.C. 113(f); and use of a firearm in relation to a crime of violence, in violation of 18 U.S.C. 924(c). She was sentenced to five years' imprisonment and three years' probation. J.A. 56-57.

1. On December 20, 1986, respondent became upset with her third husband, Neil, when he knocked over a Christmas tree during an argument in their house on a military reservation in Hawaii. Tr. 29, 44, 164-165. Neil left the house after the argument. Tr. 48. Later that day, respondent told a friend that she was angry with her husband and that she would shoot him if she could find a gun. Tr. 165. She had made similar remarks in the past. Tr. 221. Respondent was drinking beer at home with her friends when Neil returned. Neil was disturbed that respondent was drinking, so he took her beer from the refrigerator and moved it out into the yard. Respondent then chased Neil into the kitchen where they had a loud argument. Tr. 165-168.

After the fight, Neil left the house again. Respondent, carrying a gun, emerged from the house and told Neil that he should leave. Tr. 169-170, 316. Neil started to walk back toward the house, whereupon respondent shot and seriously wounded him. Tr. 196. Respondent then walked over to Neil and said in a normal tone of voice, "I told you I would do it." Tr. 211. When a military policeman arrived on the scene, respondent told him: "He threw the Christmas tree down and that made me mad, but he took my beer and that was the last straw." Tr. 352-353. Respondent admitted at trial that she had also fired a gun at her first husband, and that she had boasted of shooting at her second husband as well. Tr. 311, 328.

2. Prior to trial, in accordance with what was at that time the normal practice in the District of Hawaii, the district court assigned jury selection to a federal magistrate. Respondent did not object to that assignment, nor did she request that a district judge, rather than a magistrate, conduct the selection of the jury.

During voir dire, the magistrate sustained respondent's only objection to a proposed question submitted by the government. J.A. 47-48. In addition, the magistrate asked an additional question of the venire at respondent's request. J.A. 49. At the conclusion of

jury selection, the magistrate asked the parties: "For the record, would you like—is there any objection you'd like to make in the manner in which the jury was selected?" J.A. 54. Respondent's counsel replied: "No, your honor." *Ibid.* When the trial began the next day before a district judge, respondent did not object to the magistrate's supervision of jury selection or to any of the magistrate's rulings during that process. The jury found respondent guilty on all three counts described above.[1]

3. In her initial brief on appeal, respondent challenged only her firearms conviction under 18 U.S.C. 924(c). She did not raise any issue concerning the selection of the jury by the magistrate. While the appeal was pending, this Court decided *Gomez* v. *United States*, 109 S. Ct. 2237 (1989). In *Gomez*, the Court held that the Federal Magistrates Act, 28 U.S.C. 631 *et seq.*, does not authorize district courts to delegate jury selection in felony trials to magistrates, and that the selection of a jury by a magistrate is not harmless error if the defendant made a timely objection. In a motion filed in the court of appeals after the *Gomez* decision, respondent argued for the first time that the district court committed reversible error in delegating jury selection to a magistrate.

The court of appeals reversed respondent's convictions. The court first held that *Gomez* should be applied retroactively to all cases pending on direct appeal at the time it was decided. Pet. App. 7a-8a.[2] The court then held that respondent had not waived

[1] Count 1 of the indictment charged respondent with assault with the intent to commit murder. The jury found her guilty of the lesser-included offense of assault with a deadly weapon.

[2] We have not challenged the court of appeals' ruling on that point.

her right to raise the *Gomez* claim by her failure to object in the district court. The court reasoned that nothing in the *Gomez* opinion suggests that "the Court intended to limit the broad, definitive rule it announced" to cases, like *Gomez*, in which the defendant objected. *Id.* at 9a.

The court of appeals held that, in any event, no objection was necessary to preserve the claimed error because two previous decisions of the Ninth Circuit had held that magistrates may conduct voir dire in felony trials.[3] Pet. App. 9a-10a. Thus, according to the court, respondent faced a "solid wall of circuit authority" that "would have prevented the district court from correcting the alleged error." *Id.* at 10a. In the court's view, to require a defendant to object to "aspects of the trial that have already been approved by the court of appeals" would encourage "defense counsel to burden district courts with repeated assaults on then settled principles out of hope that those principles will be later overturned." *Ibid.* (quoting *Guam* v. *Yang*, 850 F.2d 507, 512 n.8 (9th Cir. 1988) (en banc)).

The Ninth Circuit noted that the "solid wall of circuit authority" exception to the contemporaneous objection rule had been used in the past only to excuse a defendant's failure to object to a jury instruction. The court reasoned, however, that the rule announced in *Gomez* "touches on one of the most 'basic rights' of the accused, the right to a fair and accurate trial." Pet. App. 10a. Thus, the court concluded that it would be "at best unseemly, and at worst irresponsi-

[3] The two decisions were *United States* v. *Peacock*, 761 F.2d 1313 (9th Cir.), cert. denied, 474 U.S. 847 (1985), and *United States* v. *Bezold*, 760 F.2d 999 (9th Cir. 1985), cert. denied, 474 U.S. 1063 (1986).

ble, to penalize" respondent for failing to object to the selection of the jury in this case by a magistrate. *Ibid.*[4]

SUMMARY OF ARGUMENT

The Federal Rules of Criminal Procedure require a party to make known to the court the party's objection to the court's ruling at the time the ruling is made (Fed. R. Crim. P. 51); the Rules further provide that an error as to which no contemporaneous objection is made will be reviewed only if it satisfies the exacting standards of the "plain error" doctrine (Fed. R. Crim. P. 52(b)). The district court in this case delegated the task of jury selection to a magistrate, a course of action that the Court subsequently held improper in *Gomez* v. *United States*, 109 S. Ct. 2237 (1989). Respondent, however, did not object to that delegation and in fact expressed satisfaction with the procedure by which the jury was selected. It was not until appeal that respondent argued that the district court should not have delegated jury selection to a magistrate. Because respondent failed to preserve

[4] All other circuits that have considered the matter have rejected claims based on *Gomez* in cases in which the defendant did not object. See *United States* v. *Wey*, 895 F.2d 429 (7th Cir. 1990); *United States* v. *Vanwort*, 887 F.2d 375 (2d Cir. 1989), cert. denied, 110 S. Ct. 1936 (1990); *United States* v. *Mang Sun Wong*, 884 F.2d 1537 (2d Cir. 1989), cert. denied, 110 S. Ct. 1140 (1990); *Government of the Virgin Islands* v. *Williams*, 892 F.2d 305 (3d Cir. 1989). A panel of the First Circuit in *United States* v. *Lopez-Pena*, 890 F.2d 490 (1989) (withdrawn), reh'g granted (Feb. 9, 1990), held that delegating jury selection to a magistrate was not plain error that required reversal in the absence of an objection. On February 9, 1990, however, the First Circuit vacated the panel decision and set the case for argument before the entire court. The en banc court has not yet ruled.

her claim in the district court, the court of appeals should not have reversed her conviction.

None of the possible grounds for disregarding the contemporaneous objection rule is applicable in this case. First, the delegation of jury selection to a magistrate was not "plain error," since it did not result in a miscarriage of justice. The jury selection procedure was conducted fairly; the magistrate ruled in respondent's favor on the only disputed issues that arose in the course of jury selection; and respondent expressed satisfaction afterwards with the jury selection process.

Second, the fact that a magistrate does not have authority, or "jurisdiction," to conduct jury selection does not require automatic reversal in every case in which the jury was selected by the magistrate, if the defendant did not object to that procedure at the time. Of course, there are limits to the extent to which the parties may consent to deviations from the basic procedures for litigating criminal cases. But the delegation of a limited task in the course of a criminal trial to a judicial officer who has been designated by Congress to perform many judicial duties does not call into question the fairness, integrity, or public reputation of judicial proceedings. The delegation, even though error, should therefore not be cognizable in the absence of an objection by the defendant.

Third, respondent should not be excused from making a contemporaneous objection to the delegation of jury selection to a magistrate because of what she characterizes as a "solid wall of circuit authority" against her on the issue at the time of her trial. Nothing in the Federal Rules of Criminal Procedure or in this Court's cases suggests that adverse circuit

court precedent is enough to excuse a party from its obligation to make contemporaneous objections to rulings with which the party disagrees.

In any event, it is incorrect to characterize the Ninth Circuit cases permitting magistrate jury selection as a "wall of circuit authority" that rendered futile any objection by respondent to having the magistrate select the jury. The Ninth Circuit cases merely authorized the delegation of jury selection to magistrates; they did not require that it be done. Respondent therefore could have asked the district judge to conduct the jury selection, and nothing in the Ninth Circuit's decisions would have prevented the district judge from doing so.

Relieving defendants of the contemporaneous objection requirement is particularly unwise in this context, since defendants in particular cases may well prefer to have a magistrate, rather than the district judge, conduct jury selection. Defense counsel may, for example, view a particular magistrate as more flexible than the district judge or more favorably inclined to the defense in the matter of jury selection. To excuse the failure to object to the magistrate's role in jury selection therefore may permit the defendant to enjoy jury selection by the magistrate—the option he would have chosen if asked—and then obtain a reversal of his conviction by complaining for the first time on appeal that the magistrate should not have been permitted to select the jury.

ARGUMENT

RESPONDENT FORFEITED HER RIGHT TO HAVE A JUDGE PRESIDE OVER VOIR DIRE BECAUSE SHE DID NOT OBJECT TO THE MAGISTRATE'S ROLE IN SELECTING THE JURY

In *Gomez* v. *United States*, 109 S. Ct. 2237 (1989), the defendants objected to the delegation of jury selection to a federal magistrate. The district court overruled that objection, and the Second Circuit affirmed. This Court granted certiorari to decide whether the assignment of jury selection to a magistrate "without the defendant's consent" violated the Federal Magistrates Act, 28 U.S.C. 631 *et seq.* See 109 S. Ct. at 2239. The Court held that presiding over jury selection at felony trials is not one of the "additional duties" that may be delegated to magistrates under 28 U.S.C. 636(b)(3). And the Court ruled that such a delegation, over "the defendant's objection," cannot be harmless error. 109 S. Ct. at 2248.

The issues litigated in *Gomez* were raised in the conventional manner. The defendants preserved their claim for appellate review by first raising it in the district court and then presenting it to the court of appeals. In this case, by contrast, it is conceded that respondent did not make any objection in the trial court to having the magistrate conduct jury selection. This case therefore presents the question whether the Ninth Circuit erred in disregarding the usual procedure for preserving issues and excusing respondent's failure to make any objection to having a magistrate conduct the selection of the jury.

A. The Contemporaneous Objection Rule Serves Important Purposes In Criminal Litigation

This Court has emphasized that "[n]o procedural principle is more familiar to [the] Court than that a * * * right may be forfeited in criminal as well as civil cases by failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus* v. *United States*, 321 U.S. 414, 444 (1944). Accord *United States* v. *Frady*, 456 U.S. 152, 162 (1982); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-239 (1940). The principle providing for the forfeiture of legal claims in the absence of a contemporaneous objection is embodied in Federal Rule of Criminal Procedure 51. That rule abolished the use of "exceptions" to preserve legal claims, but retained the requirement that a party make its objections and wishes known to the district court. An error is presented under the Rule only if the party "makes known to the court the action which that party desires the court to take or that party's objection to the action of the court." *Hill* v. *United States*, 261 F.2d 483, 489 (9th Cir. 1958).[5]

This Court has applied the contemporaneous objection rule in a variety of contexts.[6] For example, in

[5] Rule 51 excuses the lack of an objection if "a party has no opportunity to object to a ruling or order." In this case, of course, respondent's counsel was fully aware of the trial court's delegation of jury selection to a magistrate, and counsel was not in any way prohibited from making a timely objection to the procedure. Counsel therefore had ample "opportunity" to make an objection. Compare J.A. 54.

[6] Strictly speaking, Rule 51 sets forth a rule of forefeiture, not waiver, although the courts occasionally speak in terms of a defendant's "waiver" of a legal claim. See Wangerin, *"Plain Error" and "Fundamental Fairness": Toward a Definition of Exceptions to the Rules of Procedural Default*, 29 De Paul L. Rev. 753, 757-758 (1980). The term "waiver" often connotes the intelligent and knowing relinquishment of a right. See, *e.g.*, *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). The forfeiture principle in Rule 51, by contrast, does not depend on the defendant's state of mind when he failed to raise an issue in the trial court. See *United States* v. *Gagnon*, 470 U.S. 522, 527-528 (1985); *Wainwright* v. *Sykes*, 433 U.S. 72, 82-91 (1977); *Estelle* v. *Williams*, 425 U.S. 501, 508 & n.3 (1976).

United States v. *Gagnon*, 470 U.S. 522 (1985), the district court held a conference in chambers outside the presence of the defendants. The defendants did not object, but on appeal they argued that the district court had violated their right under Federal Rule of Criminal Procedure 43(a) to be present at all stages of a criminal trial. This Court held that the defendants had forfeited their rights under Rule 43 because "[n]o objections of any sort were lodged." 470 U.S. at 528. Likewise, in *Levine* v. *United States*, 362 U.S. 610 (1960), the Court ruled that the defendant had forfeited any due process right to a public trial by not asking the district judge to open the courtroom. *Id.* at 619. See also *Segurola* v. *United States*, 275 U.S. 106, 111-112 (1927) (Fourth Amendment challenge to the seizure of evidence forfeited in the absence of a timely motion to suppress); 3A C. Wright, *Federal Practice and Procedure* § 842, at 287 (2d ed. 1982) (requirement that defendant object and express his preference applies "to all kinds of rulings at the trial").[7]

[7] The courts of appeals have consistently held that defendants forfeit statutory and constitutional rights if they fail to make an objection, unless the forfeiture results in a miscarriage of justice. See, *e.g.*, *United States* v. *Figueroa*, 818 F.2d 1020, 1025 (1st Cir. 1987) (forfeited *ex post facto* argument); *United States* v. *Bascaro*, 742 F.2d 1335, 1365 (11th

The reasons that a defendant must make his views known to the trial court are familiar ones. First, the requirement greatly promotes judicial economy. See *Wainwright* v. *Sykes*, 433 U.S. at 90; *United States* v. *Smith*, 490 F.2d 789, 794-795 (D.C. Cir. 1974); *United States* v. *Bamberger*, 456 F.2d 1119, 1131 (3d Cir. 1972), cert. denied, 413 U.S. 919 (1973); 3 W. LaFave & J. Israel, *Criminal Procedure* § 26.5, at 251 (1984). If the issue is raised in the trial court, the trial judge may be able to resolve the matter to the defendant's satisfaction. See *United States* v. *Gagnon*, 470 U.S. at 529. Or the prosecutor might decide to forgo a particular course of conduct in order to eliminate the possibility of inserting a reversible error into the record. See generally *Luce* v. *United States*, 469 U.S. 38, 42 (1984); *Wainwright* v. *Sykes*, 433 U.S. at 89. In either case, a contemporaneous objection would eliminate the need for an appellate reversal and a second trial on the same charges.

Second, the contemporaneous objection rule requires the parties to declare themselves as to the actions they want the court to take. As a matter of basic fairness, a defendant should not be able to pursue a certain course at trial for tactical reasons and, if convicted, later claim that the course followed by the court was reversible error. See 3 W. LaFave & J. Israel, *supra*, at 251; see also *Wainwright* v. *Sykes*, 433 U.S. at 89.

Cir. 1984) (forfeited double jeopardy defense), cert. denied, 472 U.S. 1017 (1985); *United States* v. *Coleman*, 707 F.2d 374, 376 (9th Cir.) (forfeited Fifth Amendment claim), cert. denied, 464 U.S. 854 (1983); *United States* v. *Surridge*, 687 F.2d 250, 255 (8th Cir.) (forfeited Fourth Amendment objection), cert. denied, 459 U.S. 1044 (1982).

This Court in *Wainwright* v. *Sykes* summarized the importance of the contemporaneous objection rule when it described a criminal trial:

> A defendant has been accused of a serious crime, and this is the time and place set for him to be tried by a jury of his peers and found either guilty or not guilty by that jury. To the greatest extent possible all issues which bear on this charge should be determined in this proceeding: the accused is in the courtroom, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens. Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification.

433 U.S. at 90.

B. No Exception To The Contemporaneous Objection Rule Is Applicable To This Case

There are three possible arguments to support respondent's claim that she should be exempt from Rule 51. First, it can be argued that the delegation of jury selection to a magistrate constitutes "plain error" cognizable even in the absence of an objection. Second, it can be argued that this Court's decision in *Gomez* held that the delegation of jury selection to a magistrate is a jurisdictional error that cannot be forfeited by a failure to object. The third and narrowest argument, which the Ninth Circuit accepted in this case, is that respondent was not required to express her view regarding jury selection because an

objection would have been futile in light of prior circuit precedent. No court has adopted either of the first two arguments, and none of the three is persuasive.

a. The broadest argument for refusing to apply the contemporaneous objection rule in this case is that the assignment of jury selection to a magistrate constitutes "plain error" reviewable even in the absence of an objection under Fed. R. Crim. P. 52(b). In her brief in opposition to the petition for a writ of certiorari, respondent eschewed all reliance on the plain error doctrine. See Br. in. Opp. 14-16. That tactic is understandable, since every court that has addressed the plain error claim has rejected it.[8]

As this Court has noted, the plain error rule set forth in Fed. R. Crim. P. 52(b) is a narrow exception to the contemporaneous objection rule, one that "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *United States* v. *Frady*, 456 U.S. 152, 163 n.14 (1982). The plain error rule should be used "to correct only 'particularly egregious errors,' those that 'seriously affect the fairness, integrity or public reputation of judicial proceedings.'" *United States* v. *Young*, 470 U.S. 1, 15 (1985) (citation omitted). To satisfy this standard, a reviewing court must "find that the claimed error not only seriously affected

[8] See *United States* v. *Musacchia*, 900 F.2d 493 (2d Cir. 1990); *United States* v. *Wey*, 895 F.2d 429 (7th Cir. 1990); *United States* v. *Lopez-Pena*, 890 F.2d 490 (1st Cir. 1989) (withdrawn), reh'g granted (Feb. 9, 1990); *United States* v. *Ford*, 824 F.2d 1430, 1438-1439 (5th Cir. 1987), cert. denied, 484 U.S. 1034 (1988); *United States* v. *DeFiore*, 720 F.2d 757, 764-765 (2d Cir. 1983), cert. denied, 466 U.S. 906 (1984); *United States* v. *Rivera-Sola*, 713 F.2d 866, 974 (1st Cir. 1983).

'substantial rights,' but that it had an unfair prejudicial impact" on the trial. *Id.* at 17 n.14. To show plain error, therefore, respondent had to establish not only that a fundamental error occurred at trial, but also that the error affected the result of her trial.

At no point has respondent suggested any way in which the magistrate's handling of the jury selection was inadequate. The magistrate ruled in respondent's favor on the only points respondent raised during jury selection, and at the conclusion of jury selection respondent's counsel expressed satisfaction with the way the process was handled. The delegation of jury selection to a magistrate in this case cannot be regarded as a "miscarriage of justice," because there is absolutely no basis in this record on which to conclude that the magistrate's performance had any adverse effect on the way the case was tried or the ultimate outcome of the trial. To the contrary, there is every reason to believe that respondent was satisfied with having the magistrate conduct the jury selection, both at the outset of that process and at its conclusion.

The Court in *Gomez* held that the delegation of jury selection to a magistrate can never be dismissed as harmless error, see Fed. R. Crim. P. 52(a). The Court's determination that a *Gomez* error can never be harmless within the meaning of Rule 52(a) does not, however, mean that such an error is always "plain" within the meaning of Rule 52(b).

The doctrines of harmless error and plain error protect different interests and are not simply "flip sides of the same coin." *United States* v. *Lopez-Pena*, 890 F.2d 490, 495 (1st Cir. 1989) (advance sheet edition; opinion withdrawn from bound volume), reh'g granted (Feb. 9, 1990). The harmless error rule protects rulings in criminal cases from attack on

inconsequential grounds and therefore ordinarily requires a reviewing court to find prejudice to the defendant before overturning the ruling in question. The plain error rule has the dual function of protecting the process of adjudication at trial by requiring the defendant to make her wishes known with respect to a particular ruling and at the same time protecting against the risk that a defendant will be unjustly convicted due to a serious default on the part of her attorney. Because of the different policies served by the two doctrines, an error that is nonharmless is not necessarily "plain." An error will be found to be harmless only if a reviewing court still has great confidence that the error did not materially affect the verdict. In order to rise to the level of plain error, however, an error must have a more demonstrable effect on the verdict, since concern for the fairness of the proceedings must be balanced against the strong policy interests requiring an assertion of error to be brought to the attention of the district court in time for the error to be avoided.

The Court has identified several classes of errors that are not subject to harmless error analysis.[9] But that does not mean that such an error must result in reversal even if the defendant fails to call it to the district court's attention. A ruling that harmless

[9] See, *e.g.*, *Young* v. *Vuitton et Fils S.A.*, 481 U.S. 787, 809-814 (1987) (plurality opinion) (appointment of a prosecutor with a financial interest in the outcome creates an appearance of impropriety and has effects on the prosecution that are difficult to assess); *Rose* v. *Clark*, 478 U.S. 570, 578 (1986) ("harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury"); *Vasquez* v. *Hillery*, 474 U.S. 254 (1986) (unlawful exclusion of members of the defendant's race from the grand jury strikes at fundamental values of our society and does not lend itself to harmless error analysis).

error analysis is inapplicable to a particular error rests on the difficulty of assessing whether the practice at issue causes prejudice, not on the conclusion that the practice results in prejudice to the defendant in every case. See *Tumey* v. *Ohio*, 273 U.S. 510, 532 (1927). Thus, the Court's decision in *Gomez* that harmless error analysis does not apply when a magistrate picks a jury does not mean that respondent was prejudiced by the magistrate's role at her trial. By contrast, the plain error standard requires a showing of substantial prejudice, which respondent cannot make.[10]

The distinction between harmless error and plain error analysis is clearest with respect to errors that have the potential to be highly prejudicial, but which the defendant, in particular settings, may wish to let pass, or even welcome. An erroneous ruling cannot be considered plain error where the defendant may have good reason not to resist it.

Two examples illustrate this point. The Court has stated that the introduction of a coerced confession cannot be harmless error. See *Bram* v. *United States*, 168 U.S. 532, 541-543 (1897); *Rose* v. *Clark*, 478 U.S. 570, 577, 578 n.6 (1986); *Chapman* v. *Califor-*

[10] The courts of appeals that have considered the relationship between the harmless error and plain error standards have suggested that a finding of plain error ordinarily requires a greater showing of prejudice than is necessary to avoid a finding of harmless error. See *United States* v. *Thame*, 846 F.2d 200, 207 (3d Cir.), cert. denied, 488 U.S. 928 (1988); *United States* v. *Silverstein*, 732 F.2d 1338, 1349 (7th Cir. 1984), cert. denied, 469 U.S. 1111 (1985). That is particularly so with respect to constitutional errors, which cannot be excused under the harmless error doctrine unless the errors are harmless beyond a reasonable doubt.

nia, 386 U.S. 18, 23 & n.8 (1967).[11] But that is not to say that the introduction of a coerced confession is necessarily plain error. The defendant may not be strongly opposed to having the confession admitted, or he may even have tactical reasons for wanting the confession before the jury—for example, to show the jury that the police badgered him during the course of the investigation. Or, the defendant may believe that in light of the strength of the prosecution's case against him, suppression of the confession would do him no good, and he may consider it more fruitful to plant a potential basis for reversal in the case by allowing the confession to be admitted and objecting on appeal to its admission.

Similarly, in *Turner* v. *Murray*, 476 U.S. 28 (1986), the Court adopted a per se rule that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias. The Court's rule apparently would not allow a finding of harmless error in any case in which the defendant requested the inquiry. Because it recognized that defense counsel might prefer not to broach the subject of racial prejudice, however, the Court held that the defendant would be entitled to the inquiry only upon request. 476 U.S. at 37 & n.10. Thus, omission of the inquiry upon request could not be harmless error; if the defendant made no request, however, the omission would not constitute plain error.

In this case, by analogy, the fact that harmless error principles do not apply to a *Gomez* error d s

[11] The correctness of that principle is one of the issues presented in *Arizona* v. *Fulminante*, No. 89-839, cert. granted (Mar. 26, 1990).

not mean that respondent should be free to raise such an error on appeal without having preserved an objection in the district court. As in the examples cited above, respondent may have preferred the procedure employed at trial or may have been indifferent to whether the magistrate or the trial judge presided over jury selection. Respondent's late-blooming objection to the procedure may simply be the product of her disappointment that she was subsequently convicted and her search for some ground on which to obtain a new trial.

b. A second, related argument for reversal is that the error of delegating jury selection to a magistrate is a "jurisdictional error" that may not be forfeited or waived. The Court in *Gomez* characterized the delegation of jury selection to a magistrate as an error relating to "jurisdiction." That is, the Court based its holding on "a defendant's right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside." 109 S. Ct. at 2248. In light of that language, the argument has been made, albeit never successfully, that *Gomez* does not permit waiver or forfeiture of the right to jury selection by an Article III judge. That contention misreads the Court's opinion in *Gomez*.

The word "jurisdiction" is "a many-hued term." *United States* v. *Wey*, 895 F.2d 429, 431 (7th Cir. 1990). As the Seventh Circuit noted in *Wey*, "*Gomez* uses the word 'jurisdiction' in a context revealing that the Court meant 'authority.'" *Id.* at 431. That is, the district court had no authority under the Magistrates Act to refer jury selection to a magistrate. See also *United States* v. *Rodgers*, 466 U.S. 475, 479-480 (1984) (defining "jurisdiction" in 18 U.S.C. 1001 to mean "official, authorized functions"); cf.

Zipes v. *Trans World Airlines, Inc.*, 455 U.S. 385, 395 (1982) (holding that time limit for filing Title VII claims could be waived or tolled even though Court had earlier termed the requirement "jurisdictional").[12]

Although the magistrate did not have authority, or "jurisdiction," to conduct jury selection, that "jurisdictional" flaw likewise does not require reversal in the absence of an objection. There are, of course, limits to the extent to which a court may delegate criminal trial functions to unauthorized persons. Even if it were done with the consent of the parties, a court's delegating to a panel of citizens the task of ruling on objections, instructing the jury, and imposing sentence would be plain error, since such a flagrant departure from traditional procedures would "seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936). But magistrates are judicial officers who perform a variety of functions in aid of Article III judges, including, with the consent of the parties, conducting civil and misdemeanor criminal trials. See 18 U.S.C. 3401; 28 U.S.C. 636(b) and (c). While we now know that magistrates are not authorized to conduct felony jury selection, that degree of participation by a magistrate in felony trials is not so incongruous or inconsistent with our shared notions of procedural regularity as to undermine the integrity and public reputation of the federal criminal courts. The "jurisdictional" flaw in the delegation of jury selection to a federal magistrate is therefore not plain error, and does not render the ultimate judgment voidable absent an objection from the defendant.

[12] The district court, of course, did not lose subject matter jurisdiction over this case simply because it erroneously delegated jury selection to a magistrate. Subject matter jurisdiction is lacking when the court cannot issue a binding judgment on the subject. There is no doubt that the court had jurisdiction to enter a judgment of conviction, which incorporated respondent's sentence. Whether the district judge or federal magistrate presided "during jury selection does not affect the court's subject-matter jurisdiction, for it has nothing to do with whether the tribunal may enter a judgment conclusively resolving this dispute." *United States* v. *Wey*, 895 F.2d at 431. Accord *United States* v. *Musacchia*, 900 F.2d 493 (2d Cir. 1990); see generally *CFTC* v. *Schor*, 478 U.S. 833, 848 (1986) ("Article III's guarantee of an impartial and independent federal adjudication is subject to waiver."). Accordingly, the trial court's error in delegating jury selection to a magistrate was not a "jurisdictional" error of the sort that may be raised at any time (or noted by the court *sua sponte*) and requires reversal of the judgment whenever it is noticed.

c. The third argument for reversal—the alleged futility of objecting to magistrate jury selection—is the one on which respondent and the Ninth Circuit principally rely. The Ninth Circuit held that respondent was not required to express her desire to have a district judge preside at voir dire because, in the court's view, there was a " 'solid wall of circuit authority' which would have prevented the district court from correcting the alleged error." Pet. App. 10a (quoting *Guam* v. *Yang*, 850 F.2d at 512 n.8).

Nothing in the Federal Rules of Criminal Procedure or the decisions of this Court suggests that "a solid wall of circuit authority" constitutes an exception to the requirement that an issue be raised in the district court in order to be preserved for review. Rule 51 does not contain such an exception, and Rule 52(b) provides only one exception to the requirement of contemporaneous objection—the exception for

"[p]lain errors or defects affecting substantial rights."

In the analogous context of an action for habeas corpus relief from a state criminal conviction, this Court has held that contrary and binding state authority is not sufficient cause for a defendant's failure to present a constitutional objection to a state court. See *Engle* v. *Isaac*, 456 U.S. 107 (1982). In holding that the failure to object precluded federal habeas corpus review, the Court stated: "[T]he futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial." *Id.* at 130. As the Court explained, "[i]f a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim." *Ibid.* See also *Estelle* v. *Williams*, 425 U.S. 501, 515 (1976) (Powell, J., concurring) (defense counsel should not be allowed "deliberately to forgo objection to a curable trial defect, even though he is aware of the factual and legal basis for an objection, simply because he thought objection would be futile").

To be sure, the Court has held that if a legal issue is sufficiently "novel" at the time of the defendant's trial, the novelty of the issue may constitute sufficient cause for his lawyer's failure to raise the issue and therefore justify the habeas court in overlooking the failure to comply with the State's contemporaneous objection rule. *Reed* v. *Ross*, 468 U.S. 1 (1984). The Court has distinguished, however, between issues that are "novel" and those as to which defense counsel regards an objection as "futile." See *Engle* v. *Isaac*, 456 U.S. at 130-131. As the Court has explained, in order to satisfy the "novelty" requirement, the claim must be one as to which counsel has "no reasonable

basis upon which to formulate" a legal objection. *Reed* v. *Ross*, 468 U.S. at 14-15.

The Court in *Reed* v. *Ross* identified three circumstances in which a claim might be regarded as sufficiently novel to excuse the failure of counsel to raise it: where the claim is foreclosed by a decision of this Court, which must be explicitly overruled in order for the claim to succeed; where the claim is contrary to "a longstanding and widespread practice to which [the] Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved"; and where the claim challenges a practice this Court has sanctioned in prior cases. 468 U.S. at 17.

On occasion, this Court has excused the failure to raise a legal issue on direct appeal in a federal criminal case, where the issue in question is "novel" in the sense that the Court used the term in *Reed* v. *Ross*. Thus, the Court held in *Grosso* v. *United States*, 390 U.S. 62, 70-71 (1968), that in light of prior decisions of the Court, the defendant's failure to raise a constitutional objection to certain counts in the indictment against him would not be regarded as a waiver of his privilege against compulsory self-incrimination with respect to the charges in those counts. Similarly, in *Westover* v. *United States*, one of the cases decided together with *Miranda* v. *Arizona*, 384 U.S. 436 (1966), the Court held that counsel's failure to argue that the warnings set forth in the *Miranda* case should have been given did not result in a forfeiture of that claim. 384 U.S. at 495 n.69. The Court apparently based that conclusion on the novelty of the issue decided in *Miranda*, and the fact that the defendant's trial had occurred even prior

to the Court's earlier, related decision in *Escobedo* v. *Illinois*, 378 U.S. 478 (1964).[13]

Thus, while the novelty of a legal issue may excuse the failure to raise the issue below in certain narrowly defined circumstances, this Court has never recognized a general "futility" exception to the contemporaneous objection rule. And the Court's decisions provide no support for the Ninth Circuit's rule that an objection need not be raised at trial simply because the court of appeals has unfavorable law on the issue. In any event, even if the Court were prepared to recognize some form of "futility" exception, this case would not fall within it.

Even the Ninth Circuit has characterized the "futility" exception as "very narrow." *Guam* v. *Yang*, 850 F.2d at 512 n.8. As conceived by the Ninth Circuit, the exception applies only in a case where an objection would be pure ritual—*i.e.*, where the district judge is bound by precedent in his circuit to follow a prescribed course of action. In such a case, none of the reasons underlying Rule 51 would apply, because the defendant would not be in a position to make a tactical choice (there would be only one available option) and the trial court would not be free to correct any alleged error (it would be bound by higher authority). Thus, the courts of appeals that

[13] In neither case did the Court discuss at length the reason it found the claims to be cognizable even though not raised below. In both cases, however, in addition to finding that the issues were novel, the Court used language suggesting that it regarded forfeiture of claims to require a deliberate decision to waive them. In subsequent decisions, the Court has made clear that that is not the governing standard for determining whether a defendant has forfeited procedural rights at trial. See *Davis* v. *United States*, 411 U.S. 233 (1973); *Wainwright* v. *Sykes*, *supra*; *United States* v. *Broce*, 109 S. Ct. 757, 764 (1989).

have excused the failure to object on the ground of a "solid wall of circuit authority" have done so in cases in which the trial court's action was compelled by binding precedent from higher courts, *i.e.*, when the trial court had no authority or discretion to take any contrary or different action. See, *e.g.*, *United States*, v. *Liquori*, 438 F.2d 663, 665 (2d Cir. 1971); *Martone* v. *United States*, 435 F.2d 609, 610-611 (1st Cir. 1970). Indeed, the Ninth Circuit itself recognized as much in *Guam* v. *Yang*, *supra*, when it stated that this "narrow exception only applies * * * when a wall of binding authority squarely precludes the trial court from correcting an error." 850 F.2d at 512 n.8.[14]

The district court's action in this case was not mandated by binding circuit precedent. In *United States* v. *Peacock*, 761 F.2d 1313 (9th Cir.), cert. denied, 474 U.S. 847 (1985), and *United States* v. *Bezold*, 760 F.2d 999 (9th Cir. 1985), cert. denied, 474 U.S. 1063 (1986), the Ninth Circuit held that the Federal Magistrates Act vested district courts with discretion to delegate jury selection to magistrates. Nothing in those decisions hinted that district judges were required to—or even should—make such a delegation. Thus, there was no "solid wall of cir-

[14] Respondent relies on *United States* v. *Byers*, 740 F.2d 1104 (D.C. Cir. 1984), for the proposition that an objection is not required if the lawyer could have thought that one would be futile. In *Byers*, however, the defendant *did* object to the introduction of certain evidence that was the subject of the appeal. See *id.* at 1108. The defendant simply did not present to the district court the precise constitutional claim that he first raised on appeal. *Byers*, therefore, has nothing to do with a case such as this one, in which the defendant voiced no objection to the conduct on which he later premised his argument for reversal.

cuit authority" preventing the district court from conducting jury selection at respondent's trial if respondent had requested it. See *United States* v. *Lopez-Pena*, 890 F.2d at 497 (advance sheet edition) ("Even in circuits where the courts of appeals had *authorized* the practice of having magistrates preside at empanelment, no court of appeals had *insisted* that the practice be followed. * * * In that sense, then, district courts were never duty-bound in the punctilious observance of circuit precedent to reject objections to the magistrate's participation."). Indeed, prior to *Gomez* there were examples where a district judge in Hawaii had granted a defendant's request that the judge conduct voir dire. See 87-1282 Gov't C.A. Supp. Br. 6 (referring to *United States* v. *Rewald*, Cr. 84-02417).[15] Accordingly, Rule 51 required respondent to "make[] known to the court the action" that she desired in order to preserve for appellate review her claim that the district judge should have presided over jury selection.[16]

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[15] There are similar examples from other districts in which magistrates ordinarily conducted voir dire. The panel in *United States* v. *Lopez-Pena*, 890 F.2d at 497 (advance sheet edition), described such a case in the District of Rhode Island.

[16] At the time of respondent's trial, only the Ninth Circuit had squarely rejected the claim that jury selection could not be delegated to a magistrate. The First and Second Circuits had held that delegation to a magistrate did not constitute plain error, see *United States* v. *DeFiore*, *supra*; *United States* v. *Rivera-Sola*, *supra*. The only other court to rule on the merits of the delegation question had granted rehearing en banc to consider the issue. *United States* v. *Ford*, 811 F.2d 268 (5th Cir. 1987). Thus, at the time of respondent's trial, the "wall" of authority consisted of only two bricks—the two Ninth Circuit decisions—and there was reason to believe that the "wall" would soon give way to a circuit conflict, as it later did. Cf. *United States* v. *Rodgers*, 466 U.S. at 484.

We recognize that the contemporaneous objection rule requires a lawyer to raise an issue even when he knows that the court will likely overrule his objection or reject his preference. For example, if a particular district judge has ruled on a specific matter in a prior case, it is unlikely that a lawyer will convince the judge to change his mind in the present case. And if a judge adopts a particular procedure on his own motion, an advocate will often face an uphill struggle in convincing the judge to change his mind. Even in such cases, however, a contemporaneous objection serves the purposes of: (1) allowing the parties and the court an opportunity to reach a compromise that satisfies the defendant; (2) enabling the appellate court to know that the defendant was aggrieved by a particular court action; and (3) ensuring that the defendant wanted a particular ruling at trial rather than simply seeking to hold back a potential claim for appeal.[17] See generally *Engle* v. *Isaac*, 456 U.S. at 130 ("Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid."); *Myers* v. *Washington*, 646 F.2d 355, 364 (9th Cir. 1981) (Poole, J., dissenting) (futility requires more than that a claim was "unacceptable to that particular court at that particular time").

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[17] Respondent suggested in her brief in opposition (at 11) that a defense lawyer would lose credibility by making a difficult objection before the district court. We disagree. Trial courts are very familiar with the need to make a record for appellate review. Thus, a lawyer should seldom have any difficulty preserving a legal issue for appeal without offending a district judge. A lawyer will lose credibility only if he refuses to acknowledge that his claim is contrary to current law or custom.

The reasons underlying the rule requiring a litigant to make his preferences known to the trial court are fully applicable in this case. Unlike the admission of incriminating evidence, which in most cases is unfavorable to the defendant, jury selection by a magistrate may well give the defendant an advantage. Defense counsel might believe that the magistrate's view of qualified jurors is more favorable to the defendant than the district judge's view. Counsel might well conclude that a magistrate would be likely to conduct a more thorough voir dire than a district judge, who might be distracted by other matters. Counsel might conclude that the magistrate would be more amenable to the urging of counsel to ask particular questions of the prospective jurors or to permit counsel to play a greater role in the voir dire proceedings. Or, counsel might believe that the magistrate would be more willing than the district judge to grant for-cause challenges to prospective jurors. The case of assigning jury selection to a magistrate is therefore a much less compelling one for relieving defense counsel of the obligation to protest the procedure, since counsel may rationally prefer to have the magistrate select the jury. To relieve counsel of the obligation to object or waive the point allows the defendant to have the best of both worlds: the procedure the defendant prefers at the trial court level, and a winning argument on appeal if the case turns out badly.

In this case, there are good reasons to believe that the defendant was quite happy to have the magistrate preside at voir dire. The magistrate sustained defense counsel's objection to a question proposed by the government, and the magistrate asked an additional question of the venire at respondent's request. And

upon being asked directly if he had any objections to the jury selection procedure, defense counsel said that he did not. At the very least, "[t]he failure to object [likely] indicates that defense counsel felt that the trial error was not critical to his client's case," *Engle* v. *Isaac*, 456 U.S. at 136 n.1 (Stevens, J., concurring in part and dissenting in part), and was not likely to be prejudicial, *Lowenfield* v. *Phelps*, 484 U.S. 231, 240 (1988); *Wainwright* v. *Witt*, 469 U.S. 412, 430-431 & n.11 (1985). On a record such as this one, an attorney should not be permitted to remain silent, proceed with jury selection before a magistrate who makes several rulings favorable to the defense, and then on appeal claim for the first time that the district court erred in not conducting voir dire itself.

In sum, if respondent had wanted the district court to conduct voir dire, she should have said so. Because she did not, this case is exactly like many other cases in which the defendant, by failing to object, forfeited the right to claim on appeal that the district court erred in employing a particular discretionary procedure. See, *e.g.*, *United States* v. *Kirkland*, 637 F.2d 654 (9th Cir. 1980) (defendant could not question joinder where he did not move for severance); *United States* v. *Brown*, 493 F.2d 485 (5th Cir.) (defendant did not object to dispersal of jury after final argument), cert. denied, 419 U.S. 865 (1974); *United States* v. *Woodner*, 317 F.2d 649 (2d Cir.) (defendant failed to object to manner in which juror's hardship excuses were granted), cert. denied, 375 U.S. 903 (1963). As in those cases, respondent's silence in the district court should bar her from obtaining reversal of her conviction.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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